TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

No. 218.

ROBERT DUNLAP, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 22, 1897.

(16,760.)

(16,760.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 547.

ROBERT DUNLAP, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 22, 1897.

1 In the Court of Claims.

ROBERT DUNLAP, Doing Business under the Firm Name and Style of R. Dunlap and Company,
v.
THE UNITED STATES. } No. 18778.

I. Petition filed January 17, 1895.

II. Amended petition filed by leave of court April 10, 1895.

III. Second amended petition filed by leave of court April 20, 1895, which is as follows:

To the honorable the Court of Claims:

The claimant, Robert Dunlap, respectfully represents:

1. The claimant is and has been for one year last past, and long prior thereto, doing business under the firm name and style of R. Dunlap & Co., and having his factory at Nostrand and Park avenues in the city of Brooklyn, in the State of New York, and his office and principal place of business at number 178 Fifth avenue, in the city of New York and State of New York, and engaged in the manufacture of a product of the arts known and described as "stiff hats."

2. On the 28th day of August, in the year 1894, Congress passed an act entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," by the sixty-first section of which it was enacted as follows:

2 "Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid."

3. Thereafter, to wit, on the 6th day of October, in the year 1894, the Secretary of the Treasury made a decision in regard to the execution of said section, and officially notified the Commissioner of Internal Revenue thereof, as follows:

"Hon. J. S. Miller, Commissioner of Internal Revenue.

"SIR: Your communication of yesterday in reference to the execution of section 61 of the act of August 28th, 1894, and advising me that, for the reasons therein stated, 'you are unable to prepare any set of regulations which would yield adequate protection to the Government and the honest manufacturer without official supervision, which has not been provided for by Congress,' is received. I have also given much attention to the subject, and have fully considered all the arguments and suggestions submitted by the parties interested in the execution of the section of the statute referred to,

and have arrived at the conclusion that, until further action is taken by Congress it is not possible to establish and enforce such regulations as are absolutely necessary for an effective and beneficial execution of the law.

"You are therefore instructed to take no further action in the matter for the present.

"Respectfully, J. G. CARLISLE, *Secretary.*"

3 Under and in consequence of said decision no regulations have been prescribed by the Secretary of the Treasury as required by said sixty-first section, and none of the collectors of internal revenue have taken any steps to satisfy themselves in regard to the alcohol having been used by these claimants or any other manufacturers, as required by said section.

4. Between the 28th day of August, in the year 1894, and the 16th day of March, in the year 1895, the claimant found it necessary to use, and actually and necessarily did use in the manufacture of "dissolved shellac," the product or ingredient used to stiffen the hereinbefore — "stiff hats," seven thousand and sixty and ninety-five hundredths (7,060.95) proof gallons of alcohol, upon which a tax had been paid to the United States at the rate of ninety (90) cents a proof gallon on two thousand six hundred and four (2,604) proof gallons, and one dollar and ten cents ($1.10) a proof gallon on four thousand four hundred and fifty-five and one-tenth (4,455.1) proof gallons.

On or about the 17th day of October, 1894, the claimant gave the collector of internal revenue for the district in which the claimant's business is carried on, notice that he was using alcohol in the manufacture of the aforesaid products of the arts, and requested him in said notice to take such official action relative to inspection and surveillance as the law and regulations might require.

Thereafter, on or about the 12th day of January and the 22d day of March, in the year 1895, the claimant tendered to said collector affidavits and testimony, showing that he had used the quantity of alcohol hereinbefore set forth in the manufacture of "dissolved shellac," the product or ingredient used to stiffen the herein-
4 before-described "stiff hats," and not otherwise, and exhibited to said collector the stamps showing that a tax had been paid to the United States thereon as aforesaid, and then and there offered to deliver up to said collector said stamps to the end that the claimant might receive from the Treasury of the United States a rebate or repayment of the tax so paid.

But said collector, acting under the decision of the Secretary of the Treasury as hereinbefore set forth, and under instructions from said Secretary in accordance therewith, then and there declined, on the date hereinbefore specified, to receive such stamps, or such affidavits, or testimony, or any of them, or to take any steps whatever under said sixty-first section of said act of August 28, 1894.

The claimant is advised, however, that neither the failure of said Secretary of the Treasury to prescribe regulations as prescribed by said act of August 28, 1894, nor the failure of said collector of in-

ternal revenue to receive said affidavits, or testimony, or said stamps, constitutes any bar to recovering in this court from the Treasury of the United States the amount of rebate or repayment of tax as provided by law.

5. The claimant is ready and willing, and hereby offers to exhibit and deliver up to any officer of the United States, or to deposit as this honorable court may decide and direct, the stamps showing that the tax has been paid on said alcohol as aforesaid.

No other action than as aforesaid has been had on this claim in Congress, or by any of the departments.

The claimant is the sole owner of this claim, and the only person interested therein, and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

The claimant is justly entitled to the amount herein
5 claimed from the United States after allowing all just credits and offsets.

The claimant is a citizen of the United States, and he believes the facts as stated in this petition to be true.

And the claimant asks judgment for seven thousand two hundred and forty-four dollars and twenty-one cents ($7,244.21), besides costs.

GEORGE A. KING, *Attorney of Record.*
CHARLES & WILLIAM B. KING, *Counsel.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Robert Dunlap, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true to the best of my knowledge and belief.

ROB'T DUNLAP.

Subscribed and sworn to before me this 20th day of April, 1895.

RALPH T. KEYSER,
[SEAL.] *Notary Public.*

6 IV.—*Traverse. Filed June* 7, 1897.

And now comes the Attorney General, on behalf of the United States, and answering the second amended petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the said amended petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

L. A. PRADT,
Assistant Attorney General.

7 V.—*Findings of Fact and Conclusion of Law. Filed December 6, 1897.*

This case having been heard by the court, the facts are found as follows:

I.

The claimant, Robert Dunlap, has been from a time long prior to the 28th day of August, 1894, and still is, engaged in business as a manufacturer of hats, under the name and style of R. Dunlap & Co., having his factory at the corner of Nostrand and Park avenues, in the city of Brooklyn, in the State of New York.

II.

The claimant in the usual and ordinary course of his business found it necessary to use alcohol in the process of manufacture of stiff hats, in the following manner:

The alcohol is first mixed with other chemical ingredients, and shellac is then dissolved therein. The product thus obtained is then applied with a brush to the body of the hat, and both rolled and brushed in. The hat bodies are then laid away on shelves to dry. The purpose of dissolving the shellac is to render it semi-liquid in order to enable it to be forced into the pores of the felt, the use of the alcohol being as an agent to convey the shellac into the hat bodies. No alcohol remains in the finally dried body, all of it disappearing by evaporation.

The alcohol, after being mixed with the shellac as aforesaid, can only be separated by an expensive and difficult process, and can be distinguished from alcohol which has not been mixed with shellac.

The use of alcohol or some other solvent is necessary in order to stiffen the bodies of stiff hats, but, on account of the high tax on ethyl alcohol, other solvents are used for that purpose by all manufacturers of stiff hats in the United States, except a very few, who, like the claimant, manufacture hats of the highest and most expensive grades exclusively. Wood alcohol is the most efficient and also the most expensive of these substitutes. The fumes of wood alcohol irritate the eyes of the workmen, causing conjunctivitis. Workmen have sometimes been obliged to give up their work on account of its use, as it has a tendency to injure the eyes permanently.

These conditions are not so aggravated from the use of the most refined grades of wood alcohol as of the less refined and
8 cheaper grades, and recent improvements in refining have lessened the injurious effects formerly arising from its use. But for the tax on grain alcohol it would be cheaper than any grade of wood alcohol. The cost of a gallon of ordinary refined wood alcohol (95°) is about 70 cents; of the highest grade of wood alcohol, $1.50; of grain alcohol (95°) untaxed, 23 cents, and of grain alcohol taxed, $2.30.

III.

Between the 28th day of August, in the year 1894, and the 24th day of April, in the year 1895, the claimant found it necessary to use, and did use, in the manufacture of dissolved shellac, in the manner hereinbefore set forth, 2,604.17 proof gallons of domestic alcohol, upon which internal-revenue tax had been paid to the United States at the rate of 90 cents a proof gallon, amounting to $2,344.40, and 4,456.78 proof gallons of domestic alcohol, upon which an internal-revenue tax had been paid to the United States at the rate of $1.10 a proof gallon, amounting to $4,900.81, the total internal-revenue tax paid on said alcohol being $7,244.

IV.

Notice of Use of Alcohol.

On the 17th day of October, 1894, the claimant gave the following notice to the collector of internal revenue for the district in which his business is carried on:

A. Augustus Healey, collector of internal revenue, first district, New York.

SIR: We hereby notify you that we are using in the manufacture of hats at our factory, corner Nostrand and Park avenues, this city, domestic alcohol, on which we claim, under section 61 of the new tariff bill, a rebate of the internal revenue tax paid, and we respectfully request that you take such official action relative to inspection and surveillance as the law and regulations may require.

Very respectfully, R. DUNLAP & CO.

V.

Exhibition and Delivery of Stamps, etc.

The claimant, on several occasions, tendered to said collector affidavits and other evidence tending to show that he had used alcohol in the manner and quantity set forth in findings II and III, and exhibited and offered to deliver up to said collector the stamps showing that the tax had been paid thereon, together with notices in the following form:

BROOKLYN, N. Y., —— —, 189–.

Hon. collector of internal revenue, Brooklyn, N. Y.

SIR: In accordance with the requirements of section 61 of the existing tariff act, we herewith exhibit, offer, and deliver up to you the —— stamps described in the annexed memorandum, which serve to show, and do show, that the tax was paid on certain distilled spirits or alcohol, purchased at various times from the distillers' agent as per the invoices now on file in our office.

We further request and ask that you proceed to our factory at Nostrand and Park avenues, Brooklyn, N. Y., and there satisfy yourself by an examination of our stock books, records, sales books, and other documents (or in any other manner, which in your judg-

ment the law may require), that we have used said alcohol or distilled spirits in the manufacture of shellac stiffening, a product of the arts, since the enactment of said law.

We furthermore request that you pay, remit, or rebate to us $——, the full amount of the tax paid on said alcohol, or distilled spirits, to which we are entitled by the provisions of said law.

Very respectfully, R. DUNLAP & CO.

9 VI.

Attached to said notices were lists of the accompanying stamps.

Said collector, acting under instructions of the Secretary of the Treasury, declined to receive said stamps, affidavits, or other evidence, but received the notices and the lists attached thereto.

Under the act of May 28 (21 St. L., 145) the internal-revenue regulations require all packages of distilled spirits upon which the tax has been paid to have the following identifying marks and stamps:

A. On removal from receiving cistern to distillery warehouse:
- Cut on the bung stave—
  - Gross weight, tare, and net weight.
  - Number of wine gallons.
  - Proof.
  - Number of proof gallons.
- On head of package—
  - Serial number of package.
  - Serial number of warehouse stamp.
  - Date of inspection.
  - Trade name of spirits.
  - Warehouse stamp, showing—
    - Serial number.
    - Serial number of package.
    - Number of proof gallons.
    - Distiller's name.
    - Date of warehousing.
  - Cancellation of stamp, showing gauger's name and district above and below stamp.

B. On removal from distillery warehouse and payment of tax:
- Cut or branded on each package—
  - Distillery number.
  - Name of distiller and of district.
  - Date of payment of tax.
  - Number of proof gallons.
  - Serial number of tax-paid stamp.
- Tax-paid stamp (so placed on the head of the package as to cover no portion of any brand or mark already placed thereon), showing—
  - Serial number of stamp.
  - Warehouse, district, and State.
  - Date of payment of tax.
  - Number of proof gallons.

Serial number of package.
Name of consignee.
Cancellation of stamp, showing gauger's name and district above and below stamp.
(Internal Revenue Regulations, series 7, No. 7, revised, pp. 138–145.)

VII.

Between August 28, 1894, and the next session of Congress the following official action was taken in regard to section 61 of the act of August 28, 1894:

In the early part of September, 1894, the Secretary of the Treasury requested the Commissioner of Internal Revenue to have regulations drafted for the use of alcohol in the arts, etc., and for the presentation of claims for rebate of the tax. Subsequently there was correspondence between these officers as follows:

WASHINGTON, D. C., *October* 3, 1894.

Hon. John G. Carlisle, Secretary of the Treasury.

SIR: I have the honor to report that the preparation of regulations governing the use of alcohol in the arts and manufactures, with rebate of the internal-revenue tax as provided by section 61 of the revenue act of August 28, 1894, has been and is now receiving very serious consideration from this office, and many communications have been received from, and personal interviews had with, manufacturers who use alcohol in their establishments; and it is found, in every case without exception, all agree that no regulation can be enforced without official supervision, and that without such supervision the interests of manufacturers and of the Government alike will suffer through the perpetration of frauds.

As it is found to be impossible to prepare these regulations in a way that will prove satisfactory without official supervision, I have the honor to inquire whether there is any appropriation or any general provision of law authorizing the expenditure of money by this department needed to procure such supervision.

Respectfully yours, JOS. S. MILLER,
Commissioner.

WASHINGTON, D. C., *October* 5, 1894.

The Commissioner of Internal Revenue, Treasury Department.

SIR: Yours of the 3d instant, inquiring whether there is any appropriation or general provision of law authorizing the expenditure of money by the Treasury Department or by the Commissioner of the Internal Revenue to provide supervision of manufacturers using alcohol in the arts, etc., under section 61 of the act of August 28, 1894, is received, and in response I have the honor to state that no appropriation whatever, either special or general, has been made by Congress for the purpose mentioned, or for any other purpose connected with the execution of the section of the statute referred to.

Very respectfully yours, J. G. CARLISLE, *Secretary.*

WASHINGTON, D. C., *October* 5, 1894.

Hon. John G. Carlisle, Secretary of the Treasury, Washington, D. C.

SIR: I have the honor to acknowledge the receipt of your letter of the 5th instant, in reply to my letter of the 3d instant, in which you state that no appropriation whatever, either special or general, has been made by Congress authorizing the expenditure of money by the Treasury Department or by the Commissioner of Internal Revenue to provide supervision of manufacturers using alcohol in the arts, etc., under section 61 of the act of August 28, 1894, or for any purpose connected with the execution of the section of the statute referred to.

In reply I would suggest that, inasmuch as I have been unable, as stated in my letter of the 3d instant, after thorough consideration of the matter, and upon consultation by letter and by personal interview with a large number of the most prominent manufacturers, to prepare any set of regulations which would yield adequate protection to the Government and the honest manufacturer without official supervision, which has not been provided for by Congress, the preparation of these regulations be delayed until Congress has opportunity to supply this omission.

Respectfully yours, JOS. S. MILLER,
Commissioner.

WASHINGTON, D. C., *October* 6, 1894.

Hon. J. S. Miller, Commissioner of Internal Revenue.

SIR: Your communication of yesterday, in reference to the execution of section 61 of the act of August 28, 1894, and advising me that, for the reasons therein stated, you are unable "to prepare any set of regulations which would yield adequate protection to the Government and the honest manufacturer without official supervision, which has not been provided for by Congress," is received. I have also given much attention to the subject, and have fully considered all the arguments and suggestions submitted by parties interested in the execution of the section of the statute referred to, and have arrived at the conclusion that, until further action is taken by Congress, it is not possible to establish and enforce such regulations as are absolutely necessary for an effective and beneficial execution of the law.

You are, therefore, instructed to take no further action in the matter for the present.

Respectfully, J. G. CARLISLE, *Secretary.*

11 In consequence of this last letter the following circular was issued:

Circular Relative to Applications for Rebate under Section 61 of the Act of August 28, 1894.

WASHINGTON, D. C., *November* 24, 1894.

In view of the fact that this department has been unable to formulate effective regulations for carrying out the provisions of section 61 of the act of August 28, 1894, relating to the rebate of tax on alcohol used in the "arts, or in any medicinal or other like compounds," collectors of internal revenue will, on receiving notice from manufacturers of the intended use of alcohol for the purposes named, advise such manufacturers that, in the absence of regulations on the subject, no official inspection of the alcohol so used or the articles manufactured therefrom can be made, and that no application for such rebate can be allowed or entertained.

JOS. S. MILLER,
Commissioner.

VIII.

On December 3, 1894, the Secretary of the Treasury transmitted to the Congress the annual report on the finances, containing the following statement:

Owing to defects in the legislation, the Treasury Department has been unable to execute the provisions of section 61 of the act of August 28, 1894, permitting the use of alcohol in the arts, or in any medicinal or other like compound, without the payment of the internal tax. The act made no appropriation to defray the expenses of its administration, or for the repayment of taxes provided for; and, after full consideration of the subject and an unsuccessful attempt to frame regulations which would, without official supervision, protect the Government and the manufacturers, the department was constrained to abandon the effort and await the further action of Congress.

It is estimated in the office of the Commissioner of Internal Revenue that the drawbacks or repayments provided for in the act will amount to not less than $10,000,000 per annum, and that the expenses of the necessary official supervision will not be less than $500,000 per annum. For the information of Congress, the correspondence between the Secretary and the Commissioner of Internal Revenue upon this subject will accompany this report. (Finance Report, 1894, LXVI.)

Appended to this report was a draft of regulations proposed for carrying out section 61, copies of communications from the Commissioner of Internal Revenue explaining the estimates of the appropriations required, and copies of the official correspondence between the Secretary and the Commissioner, given in the preceding finding, showing the action of the department. The proposed regulations were as follows:

On the 28th of November, 1894, the Commissioner of Internal Revenue, at the request of the Secretary of the Treasury, submitted to him a draft of proposed regulations, to wit:

12 *Regulations for the Allowance of Rebate of Internal-revenue Tax on Alcohol Used in the Arts and in the Manufacture of Medicinal or Other Like Compounds.*

TREASURY DEPARTMENT,
WASHINGTON, D. C., —— —, 1894.

Section 61 of the act of Congress of August 28, 1894, entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," provides:

"Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid."

Definitions.

Article 1. The word "*manufacturer*" as employed in the statute above quoted is held to mean any person who, having an established place of business, manufactures, *for wholesale only*, articles in which alcohol is either a necessary constituent or is necessarily used in the process of manufacturing such articles, *except* spirituous liquors or other alcoholic compounds, intended or used as a beverage.

Under this construction rectifiers, compounders, or other persons manufacturing any of the articles last referred to will not be regarded as *manufacturers* within the contemplation of the statute named.

Article 2. The word "*alcohol*" is held to be distilled spirits of an alcoholic strength of not less than one hundred and eighty-eight per centum of proof spirits, as defined by section 3249 of the Revised Statutes of the United States; and which have been branded and deposited in the distillery warehouse as *alcohol*.

Article 3. The word "*arts*," as above used, is held to apply only to the manufacture of articles (other than spirituous liquors) where the process of manufacture requires the use of alcohol, and where the alcohol used is either a component part of the manufactured article or is necessarily destroyed or lost in the process of such manufacture. Under the construction here given no rebate of tax will be allowed where the alcohol used, and not remaining incorporated with the manufactured article, is recoverable by distillation, filtration, or by any other process. Also where its use is not necessarily a part of the process of manufacture; as, for instance, when used for heating, drying, or other like purposes.

Nor will such rebate be allowed on alcohol used in laboratories

(except as herein provided) or in any experimental work whatever.

Article 4. The words "*medicinal or other like compounds*" are held to be articles, preparations, or compounds prepared according to the directions of the United States or other national pharmacopœia, or according to published formulas in common use among physicians or apothecaries in the United States; also medicinal preparations prepared according to private formulas when advertised, sold, and used solely as specifics or remedies for certain diseases or bodily ailments defined and treated in standard medical works of this country.

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Under this construction no rebate of tax will be allowed on alcohol used in the manufacture of proprietary articles, wines, cordials, bitters, or other alcoholic compounds which are sold or used as a beverage or as a substitute therefor, or which, in the opinion of the Commissioner of Internal Revenue, are intended to be or may be so sold or used.

Manufacturers to File Notice and to Give Bond.

Article 5. Where rebate is to be claimed under the foregoing provision of law on alcohol used in the manufacture of articles, the manufacturer will, before obtaining the alcohol, file with the collector of internal revenue of the district in which the manufactory is situated a notice in duplicate in the following form:

(Form —.)

(Alcohol to be used for manufacturing purposes.)

Notice is hereby given that we —— ——, under the name and style of ——, are engaged (or intend to engage) in the business of manufacturing at the place herein designated the following-named articles, and that application will hereafter be made under the act of Congress of August 28, 1894, for rebate of the internal-revenue tax paid on the alcohol used in the manufacture of said article.

1. Location of premises.
2. Name and residence of owner of premises.
3. Name and residence of every person interested in the business to be carried on at said premises.
4. Description of all buildings on said premises, and purpose for which each is to be used.
5. Number and kind of stills, and capacity of each.
6. Number and kind of condensers.
7. Particular description of building or room to be used exclusively for the storage of alcohol.
8. Amount of capital now invested in the business carried on at said premises.
9. Number of persons employed on said premises.
10. Distance of premises to nearest rectifying house, or premises of a wholesale or retail liquor dealer.
11. Whether either of the above-named parties have been, or are

now, or intend to be during the ensuing year, interested in the business of manufacturing, rectifying, compounding, or selling alcoholic liquors, or compounds which may be used as a beverage.

12. Whether any of the articles below enumerated, or any articles heretofore manufactured by the parties, or either of them, were sold by them, or either of them, to any rectifier, wholesale liquor dealer, or retail liquor dealer during the year preceding the filing of this notice.

14 13. Description and estimated quantity of articles to be manufactured on said premises during the ensuing year ending June 30:

Articles.		Alcohol at 188° proof.			
Name of each.	Quantity of each.	Quantity to be used.	Quantity to be recovered.	Loss by free evaporation.	To remain incorporated in article.
		Proof galls.	*Per cent.*	*Per cent.*	*Per cent.*

14. List of articles to be manufactured on premises, as to which *no* alcohol will be used in the manufacture thereof.

15. Estimated quantity of alcohol required for a period of three months, —— proof gallons.

16. Estimated quantity to be used each day manufactory is operated.

17. Quantity of alcohol used at said manufactory during the year last preceding the filing of this notice, —— proof gallons.

18. Formula by which each article above named is to be manufactured, except drugs and other medicinal preparations, prepared according to published formulas, ——.

STATE OF ——, }
County of ——. }

Personally appeared the above-named, —— ——, who, being first duly sworn, depose and say that the statements contained in the foregoing notice are true; that the alcohol on which a rebate of internal-revenue tax is to be claimed will be used solely for the purposes and in the manner above stated; that they will not remove or permit to be removed from the premises above described any portion of the alcohol thereon stored and not used for the purposes above specified; that they will from time to time, as may be required, truly account for all alcohol received or remaining on said premises, and all alcohol used by them, and for all articles manufactured by them, or removed from their said premises; and they will give due notice to the collector of internal revenue for the district in which said premises are located of any intended change, either as to the kind of articles to be manufactured by them or as to the process to

be employed in the manufacture thereof, and that they will at all times keep the said premises, and all buildings thereon, open to the inspection of any internal-revenue officer, and will allow such officer to examine the process by which the alcohol is used in the manufacture of any of said articles, or is recovered during or after such process of manufacture; and will at all times furnish, for examination or analysis, samples of any articles stored on said premises as may be selected by said officer.

—— ——.
—— ——.

Sworn to before me this — day of ——, 1894.

—— ——. [SEAL.]

15 (In case of a firm or company (not incorporated) the notice must be signed and sworn to by each member. In case of an incorporated company the notice will be signed and sworn to by a duly authorized officer of the company.)

Article 6. A renewal notice will be required of each manufacturer on the first day of July in each year, except where an original notice has been filed within 30 days prior to that date. Also, in case of change in the ownership of the premises described, or in case of any material change in the producing capacity of the factory, or in the construction or arrangement of any still or condenser on the premises, and at such other times as may be required by the Commissioner of Internal Revenue or the collector of the district.

Article 7. The bond to be filed by the manufacturer will be in duplicate and in the following form:

(Form —.)

Manufacturer's Bond.

(Alcohol to be used for manufacturing purposes.)

Know all men by these presents, that we, —— ——, as principal-, and —— —— and —— ——, as sureties, are held and firmly bound unto the United States of America, in the sum of — dollars, for the payment whereof to the United States we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals at ——, this — day of ——, 189–.

Whereas the above-bounden principal- intend to manufacture certain articles on the premises owned, or to be occupied by them, and located at ——, county of ——, State of ——, and to use in the manufacture of said article alcohol on which a rebate of the internal-revenue tax will be claimed under the provisions of an act of Congress of August 28, 1894.

Now, therefore, the condition of this obligation is such that if the said principal- shall, as to all such alcohol received or remaining on the said premises, use the same solely in the manufacture of said articles, and in the manner described in their notice filed with the collector of internal revenue for the —— district of ——, and

shall from time to time, and in the manner required by regulations issued pursuant to said act, truly account for all alcohol received, used, or remaining on said premises, and for all articles manufactured or removed from said premises, and shall likewise comply with all other requirements of said regulations, then this obligation to be void; otherwise to remain in full force and virtue. And the obligors for themselves, their heirs, executors, administrators, and assigns, do further covenant and agree with the United States in case the said principal, his agents or employees, shall use or remove from the aforesaid premises, or permit to be used or removed, any alcohol otherwise than as above specified and authorized by the aforementioned act and regulations, or shall fail or neglect to do or cause to be done any of the acts or things hereinbefore specified or required by said act and regulations, or shall claim, or seek to obtain, a rebate of tax on any alcohol not used for the pur-
16 poses specified in their notice and in their application for rebate, well and truly pay or cause to be paid to the collector aforesaid double the amount of tax on spirits so used or removed or on which such rebate of tax is wrongfully or fraudulently claimed, and a penalty of $2,000 in addition thereto.

——— ———. [L. S.]
——— ———. [L. S.]
——— ———. [L. S.]

Article 8. In preparing the bond the following instructions must be particularly observed and complied with, viz:

1. The Christian names must be written in the body of the bond in full, and so signed to the bond, and the execution must be duly acknowledged by each of the signers before the collector or deputy collector, or an officer authorized to take the acknowledgment of deeds. When a bond is signed by an officer of a corporation the seal of the corporation must be affixed, and evidence of the authority of the officer to sign and to affix the seal filed with the collector and Commissioner of Internal Revenue.

2. The residence of each signer must be stated in the bond.

3. A seal of wax or wafer must be attached to each signature.

4. Each signature must be made in the presence of two witnesses, who must sign their names as such.

5. The bond must be properly dated and signed by at least *three* sureties (unless signed by an incorporated security company, duly qualified and approved), who must qualify (in real estate only) in an amount of not less than double the penal sum of the bond.

6. The sufficiency of the sureties should be shown by affidavits made on form 33.

7. The penal sum of the foregoing bond must at least equal double the amount of tax on the quantity of alcohol to be stored on the manufacturer's premises at any one time, and in no case be less than $5,000.

Renewal Bond.

Article 9. A renewal bond will be required upon the renewal of the manufacturer's notice, as provided in article 6, and in case of

death, insolvency, or removal of the sureties, and at such other times as the Commissioner of Internal Revenue may direct.

Store-room.

Article 10. The manufacturer will, before filing the foregoing notice and bond, provide a suitable room or building on his premises, to be used solely for the storage and safe keeping of all alcohol received or recovered by redistillation on said premises. The windows in such room or building will be provided with solid shutters with secure iron fastenings, and where a room is provided in a building to be used for any purpose other than the storage of such spirits such room must be separated from all other rooms in the building by a solid brick or plank partition, as in the case of distillery warehouses.

The store-room so provided will be secured by a Government seal lock, and will remain in the joint custody of the manufacturer
17 and the officer assigned to the manufactory (article 19), and must in no case be unlocked or remain open, unless in the presence of that officer or some person regularly designated to act in his absence and having the key to the Government lock.

Receiving Tanks.

Article 11. In order that an accurate account may be kept of the alcohol used in the manufacture of *each* article, the manufacturer will, before obtaining the alcohol, provide suitable tanks or other vessels for the storage of alcohol removed each day from the store-room, as provided in article 25. Each tank or vessel to be so used must have marked thereon, in plain letters, the name of the particular article which will be manufactured from the alcohol stored therein; and in no case must the name of more than one article be marked on any one tank.

Manufacturer's Premises to be Inspected before Approval of His Bond.

Article 12. Upon the receipt of the foregoing notice and bond the collector will carefully investigate the statements contained in the notice, and as to the sufficiency and responsibility of the offered sureties.

He will also have the manufacturer's premises inspected by a deputy collector, who will see that all regulations have been strictly complied with respecting the construction and arrangement of the storage-room, and that the statements contained in the manufacturer's notice as to the location of the premises and as to the character of the business to be carried on at the premises are true. The deputy will make report of his inspection in writing to the collector, who will, if satisfied therewith and with the notice and bond, indorse his approval on each of the papers and forward the duplicate notice and bond, together with the report of the deputy, to the Commissioner of Internal Revenue for review.

Article 13. The collector will, however, refuse to approve the notice and bond if, in his judgment, the parties filing the same intend to engage in business other than specified in their notice, or to fraudulently use any portion of the alcohol obtained by them.

In case the collector refuses to approve the notice and bond the manufacturer may appeal to the Commissioner, whose decision in the matter shall be final.

License.

Article 14. Upon the acceptance of the notice and bond by the Commissioner of the Internal Revenue a license in the following form will he issued to the manufacturer and forwarded to him through the collector of the district:

No. —.) *License.* (Form No. —.

(Alcohol to be used for manufacturing purposes.)

TREASURY DEPARTMENT,
WASHINGTON, D. C., —— —, 189–.

—— ——, manufacturer, having filed the required notice and bond, is authorized, on payment of the internal-revenue tax, 18 to withdraw from distillery warehouse or general bonded warehouse during the year ending June 30, 189–, — proof gallons of alcohol, to be immediately removed to the said manufacturer's premises, located at ——, in the State of ——, and there used solely for manufacturing purposes as specified in said notice and as authorized by the act of Congress of August 28, 1894.

—— ——,
Secretary (or Commissioner).

Each license will bear a serial number, which will be used to designate the manufactory named in the license.

Withdrawal of Alcohol from Bonded Warehouse.

Article 15. The alcohol to be used under the foregoing provisions of law must be shipped directly from a distillery warehouse or general bonded warehouse to the manufacturer's premises; and, on making application for such withdrawal, the license issued to the manufacturer will be submitted to the collector of the district in which the warehouse is located, who will, upon the withdrawal of the alcohol, endorse upon the license in the columns provided for that purpose the quantity so withdrawn, the date of withdrawal, and the serial number of the packages. Under this requirement no rebate of tax will be made on any alcohol used for manufacturing purposes and not withdrawn from bonded warehouse as herein provided.

Article 16. On receipt of an application for withdrawal of alcohol under the license issued, the collector will instruct the officer gauging the spirits to mark upon each package the words "*for manufacturing purposes;*" and the collector will, in issuing the tax-paid

stamps for such spirits, and until suitable branding stamps are furnished, write across the face of such stamp- the words "*for manufacturing purposes, under act of August 28, 1894.*"

Article 17. Except as to the additional brand above prescribed, the packages containing the alcohol will be marked, branded, and stamped, as required in other cases of withdrawal, upon payment of tax.

In affixing the tax-paid stamps on such packages the gauger will, however, instead of pasting the entire stamp to the head of the package, paste only that portion to which a slip of paper has already been attached, so that the officer assigned to the manufacturer's premises may remove such stamps and attached coupons without mutilating the same. Such stamps, however, must in all other respects be fastened (tacked) to the packages, canceled, and varnished, as required by existing regulations.

Article 18. Upon the withdrawal of the alcohol from the warehouse, the collector will note such withdrawal upon the manufacturer's license, as above required, and will then forward the license to the collector in whose district the manufacturer's premises are situated, who will, after noting the withdrawal on the records of his office, deliver the license to the manufacturer.

Assignment of Officer to Manufacturer's Premises.

Article 19. Upon receipt of the alcohol so withdrawn, the manufacturer will at once notify the collector of the district, who
19 will assign to the manufacturer's premises such officer as may be authorized by law for that purpose. Such officer must in every case be thoroughly informed on the subject of gauging distilled spirits, and should be selected with reference to the business to be carried on at the premises to which he is assigned.

The officer so assigned must be in daily attendance at the manufactory while in operation, and in case the manufactory is to be operated at night, the collector will, on notice thereof, assign an additional officer for duty at such times.

Duties of Officers.

Article 20. The officer so assigned to duty will at once carefully gauge the alcohol received by the manufacturer, and note any discrepancy, either outage or excess, between the actual contents of each package and the marks and brands thereon. He will then have the regauged packages immediately removed to the store-room, and will under no circumstances allow any portion of such alcohol to be removed therefrom except as herein authorized. The officer will likewise gauge and store all alcohol subsequently received on the manufacturer's premises.

The officer will also keep a daily record of all alcohol received on the premises, and the quantity delivered each day to the manufacturer, and he will inspect all articles received on the manufacturer's premises and all articles removed therefrom. He will

familiarize himself with the process of manufacture carried on at the premises, so far as relates to the use of alcohol or its recovery during the manufacturing process, and he will at once report to the collector and Commissioner of Internal Revenue any violation of the regulation issued on the subject, or any matter connected with business as carried on by the manufacturer, which, in his judgment, indicates a fraudulent use of the alcohol on which rebate is claimed. (For instructions as to the methylation of alcohol in certain cases, see art. 21.)

The officer will at such times, or when so required, select samples of the manufactured articles, and forward the same to the Commissioner for examination and analysis, and he will see that all labels and outside wrappers used on the manufactured article have printed thereon the notice prescribed in article 26 of these regulations before such articles leave the manufacturer's premises. (For form of monthly report of officer, see article 29.)

Methylation.

Article 21. Where alcohol is to be used in the manufacture of articles other than medicinal preparations, or other like compounds, such alcohol must be first methylated by the manufacturer and in the presence of the officer before being removed from the store-room. The methyl (wood alcohol) must be provided by the manufacturer and must be of standard strength, and will be added to the tax-paid alcohol in the proportion of one to ten (*i. e.*, one wine gallon of methyl to ten wine gallons of tax-paid alcohol), or in a larger proportion if required by the Commissioner of Internal Revenue.

The methyl to be so furnished must also be deposited in the store-room (article 10), and a sample of each lot received must be furnished to the Commissioner, and be approved by him, before being used as above provided.

20 *Delivery of Alcohol from Store-room.*

Article 22. When the manufacturer has occasion to use the alcohol so stored, the officer will deliver the same to the manufacturer in quantities not exceeding that required for immediate use during a period of twenty-four hours.

The gauger will carefully gauge or measure the alcohol so delivered, and will see that the same is immediately placed in the tanks bearing the name of the article to be manufactured.

When the alcohol so removed is to be placed in two or more tanks the gauger will note the quantity placed in each of such tanks. He will, however, in no case deliver alcohol from the store-room if the manufacturer has on his premises any alcohol not withdrawn from warehouse as hereinbefore provided.

Article 23. In removing alcohol from the store-room the same must be taken from the packages in the order the packages are numbered, commencing with the lowest serial number; and no alcohol shall be removed from a package until the entire contents

of the package bearing the next lowest serial number has been entirely emptied.

Article 24. As soon as the entire contents of a package have been removed the officer will carefully detach the tax-paid stamp and annexed coupons and retain the same in his possession until the manufacturer has prepared and signed his application for rebate of the tax represented by such stamps, at which time the officer will, after verifying the application by his records and appending his certificate thereto (article 33), deliver such stamps to the manufacturer.

Use of Alcohol.

Article 25. The alcohol so delivered to the manufacturer, and after being deposited in the proper tanks, may be used for the purposes as specified in the manufacturer's notice, and for no other purpose. No portion of the alcohol deposited in one tank shall be used for any purpose other than in the manufacture of the article as marked on that tank; and no tank shall be marked with a name of more than one article to be manufactured.

The quantity of alcohol deposited each day in each of such tanks, and the quantity removed therefrom each day, must be carefully noted and entered on the record prescribed in article 28.

The manufacturer will also enter on said record the quantity of each article manufactured each day and the quantity of each removed for consumption or sale.

All Packages to be Labeled.

Article 26. All manufactured articles containing alcohol on which a rebate of tax is to be claimed must have affixed to each bottle or package containing the same a registered label showing the quantity of alcohol contained therein. Such label will be in the following form, and must be printed on the manufacturer's label affixed to each such bottle or package, and also on the outside wrapper inclosing such bottle or package. The label to be used must be first submitted to the Commissioner of Internal Revenue for approval and registry.

21

NOTICE.

The article to which this label is affixed contains ——— * per cent. of alcohol on which REBATE OF INTERNAL REVENUE TAX has been claimed.

———— ————,

Registered. No. —. *Manufacturer.*

* Number to be here inserted. If methylated alcohol is used, the word *methylated* will also be inserted.

Article 27. The label above prescribed must be at once affixed to all such articles, and a failure to so label the articles will be a violation of this regulation, and will render the manufacturer liable for

the penalty conditioned in his bond. In order that the articles so manufactured and labeled may be kept separate from other like articles produced from alcohol on which no rebate can be allowed, the manufacturer will provide a separate room for the storage of such articles, and such room and the contents therein stored must at all times be accessible to the officer assigned to the premises.

Records to be Kept.

Article 28. Every manufacturer using alcohol as herein provided will keep a daily record showing—

1. The quantity of alcohol received on the premises (specifying serial number of package, and wine, proof, and taxable gallons).
2. If spirits are to be methylated, the quantity of methyl received and quantity used, and the quantity of spirits so methylated.
3. The quantity of alcohol removed from the store-room, and the quantity deposited in each storage tank.
4. The quantity of alcohol removed from each such tank.
5. The quantity of each article manufactured in which alcohol was used.
6. The quantity of each of such articles removed from the premises.

The manufacturer will, on the first day of each month, forward to the collector and to the Commissioner of Internal Revenue a sworn transcript of said record.

Article 29. The officer will keep a daily record, to be furnished for that purpose, showing the quantities of alcohol received, methylated, used, and remaining on hand, and he will, on the first day of each month, render a report, in the form to be prescribed by the Commissioner of Internal Revenue, covering the transactions during the preceding month.

Samples.

Article 30. The officer will, at such times as the Commissioner of Internal Revenue may direct, or at such times as he has
22 reason to suspect that the alcohol obtained by the manufacturer is being improperly used, select one or more samples of the manufactured articles and forward the same to the Commissioner for analysis.

Article 31. If upon such analysis the articles are found to be essentially different from those described in the manufacturer's notice and the formula submitted by him, or to contain a less quantity of alcohol than shown by the label, the license granted the manufacturer will be revoked and proceedings instituted on his bond.

The license will also be revoked and suit instituted in case the manufacturer fails to comply with all the requirements of the law and the foregoing regulations; and no rebate will be allowed after the revocation of such license.

No Rebate on Alcohol Lost in Transit.

Article 32. As the rebate of tax authorized by the act of August 28, 1894, is limited to alcohol actually used for the purposes therein specified, no rebate will be allowed on alcohol lost in transit or while stored on the manufacturer's premises.

Losses resulting from evaporation, or from other causes incident to the process employed in the manufacture of the articles specified in the manufacturer's notice, will not, however, be deducted in computing the rebate due where such loss is not deemed excessive.

Claims for Rebate.

Article 33. All applications for rebate of tax under the above-named act must be under oath, and the quantity of alcohol on which such rebate is claimed and the quantity of each article manufactured therefrom must be clearly stated therein.

The claim in such cases will be prepared on blank forms, to be furnished the manufacturer, and must include only so much of the alcohol as has been actually used during the preceding month, and covered by the tax-paid stamps to be furnished with such claim.

The claim in such cases must also be verified by the officer assigned to the manufacturer's premises, and when so verified will be forwarded to the collector of the district, who will, if satisfied with the proofs submitted, indorse his approval thereon, and forward the papers in the case to the Commissioner of Internal Revenue. In case the collector is not fully satisfied that the claim is a valid one, he will require such further proof as he may deem necessary, and unless such proof is furnished, no rebate of tax will be allowed. Nor will such rebate be allowed when the payment of the tax on the alcohol used is not fully established by the tax-paid stamps furnished by the claimant.

IX.

The amounts appropriated in the urgent deficiency act of January 25, 1895, for an increased force in the Bureau of Internal Revenue (28 Stats., 637), aggregating $245,095, are the amounts reported in the Secretary of the Treasury's estimate, transmitted to Congress December 4, 1894, as necessitated by the income-tax provisions of the act of August 28, 1894.

Conclusion of Law.

Upon the foregoing findings the court decides as a conclusion of law that the petition be dismissed.

23 VI.—*Opinion of the Court.*

WELDON, J., delivered the opinion of the court:

On the 20th of April, 1895, the claimant filed a second amended petition (by leave of the court), which embraces a full statement of

his claim; in which it is substantially alleged, that prior thereto he had been engaged under the name and style of Robert Dunlap and Company in the city of Brooklyn, in the State of New York, in the manufacture of a product of the arts known and described as "stiff hats."

That between the 28th of August, 1894, and the 16th of March, 1895, the claimant found it necessary to use and actually and necessarily did use in the manufacture of dissolved "shellac," the ingredient used to stiffen hats, 2,604 proof gallons of alcohol upon which a tax had been paid to the United States at the rate of 90 cents per proof gallon, and also used $4{,}455\frac{1}{10}$ proof gallons on which a tax of $1.10 per gallon had been paid. The petition further alleges, that on or about the 10th of October, 1894, the claimant gave notice to the collector of internal revenue for the district in which claimant's business was carried on, that he was using alcohol in the manufacture of said products, and requested him to take such official action relative to the inspection as the law and regulations might require; that thereafter on the 12th of January and the 22d of March, 1895, he the claimant tendered to the collector testimony and affidavits showing the amount of alcohol consumed in the manufacture of dissolved "shellac," an ingredient used in making said hats, and showing that a tax had been paid to the United States on the alcohol, exhibiting the stamps and offering to deliver to the collector the same, to the end that the claimant might receive from the Treasurer of the United States a rebate of the tax so paid by him.

It is further alleged that the collector, acting under the decision of the Secretary of the Treasury, then and there declined to receive such stamps or such affidavits, and declined to take any steps whatever under the sixty-first section of the act of Congress of August 28, 1894.

It is also shown by the allegations of the petition, that the Secretary of the Treasury on the 7th day of October, 1894, decided that until further action by Congress, it was not possible to establish and enforce a regulation under the act aforesaid, and instructed the Commissioner of Internal Revenue to take no further action in the matter at present.

It is also alleged, that the failure of the Secretary to prescribe regulations as required by said act, and the failure of the collector of internal revenue to receive affidavits and testimony constitute no bar to the claimant's right of recovery against the defendants.

The findings in substance show, that the claimant was, as it is alleged, at the time and place a manufacturer of "stiff hats" and that in such manufacture he used 2,604.17 gallons of domestic alcohol on which a tax had been paid of 90 cents amounting to the sum of $2,344.40 and 4,456.78 gallons of domestic alcohol on which a tax had been paid at the rate of $1.10 per gallon amounting to the sum of $4,900.81, making in the aggregate the sum of $7,244.20; and that on several occasions he tendered to the collector of the district evidence tending to show the use and consumption of said amount of alcohol, exhibited and offered to deliver to the collector

evidence showing that the tax had been paid on the alcohol; but the collector acting under the instructions of the Secretary of the Treasury declined to receive the stamps, affidavits or other evidence. The failure and refusal of the collector to receive and recognize the evidence offered by the claimant was owing to the failure of the Secretary of the Treasury in not preparing and prescribing regulations under the sixty-first section of the act of August 28, 1894.

On the 3d of October, 1894, the Commissioner of Internal Revenue addressed a letter to the Secretary of the Treasury as follows, to wit:

SIR: I have the honor to report that the preparation of regulations governing the use of alcohol in the arts and manu-
24 factures, with rebate of the internal-revenue tax as provided by section 61 of the revenue act of August 28, 1894, has been and is now receiving very serious consideration from this office, and many communications have been received from, and personal interviews had with, manufacturers who use alcohol in their establishments; and it is found, in every case without exception, all agree that no regulation can be enforced without official supervision, and that, without such supervision, the interests of manufacturers and of the Government alike will suffer through the perpetration of frauds.

As it is found to be impossible to prepare these regulations in a way that will prove satisfactory without official supervision, I have the honor to inquire whether there is any appropriation or any general provision of law authorizing the expenditure of money by this department needed to procure such supervision.

To which letter the Secretary replied as follows:

SIR: Yours of the 31 instant inquiring whether there is any appropriation or general provision of law authorizing the expenditure of money by the Treasury Department or by the Commissioner of the Internal Revenue to provide supervision of manufacturers using alcohol in the arts, etc., under section 61 of the act of August, 28, 1884, is received, and in response I have the honor to state that no appropriation whatever, either special or general, has been made by Congress for the purpose mentioned, or for any other purpose connected with the execution of the section of the statute referred to.

On the 5th of October, 1894, the Commissioner replied to the Secretary as follows:

SIR: I have the honor to acknowledge the receipt of your letter of the 5th instant, in reply to my letter of the 3d instant, in which you state that no appropriation whatever, either special or general, has been made by Congress authorizing the expenditure of money by the Treasury Department or by the Commissioner of Internal Revenue to provide supervision of manufacturers using alcohol in the arts, etc., under section 61 of the act of August 28, 1894, or for any purpose connected with the execution of the section of the statute referred to.

In reply I would suggest that, inasmuch as I have been unable, as stated in my letter of the 3d instant, after thorough consideration of the matter, and upon consultation by letter and by personal interview with a large number of the most prominent manufacturers, to prepare any set of regulations which would yield adequate protection to the Government and the honest manufacturer without official supervision, which has not been provided for by Congress, that the preparation of these regulations be delayed until Congress has opportunity to supply this omission.

To which the Secretary replied as follows:

SIR: Your communication of yesterday in reference to the execution of section 61 of the act of August 28, 1894, and advising me that, for the reasons therein stated, you are unable "to prepare any set of regulations which would yield adequate protection to the Government and the honest manufacturer without official supervision, which has not been provided for by Congress," is received. I have also given much attention to the subject, and have fully considered all the arguments and suggestions submitted by parties interested in the execution of the section of the statutes referred to, and have arrived at the conclusion that, until further action is taken by Congress, it is not possible to establish and enforce such regulations as are absolutely necessary for an effective and beneficial execution of the law.

You are therefore instructed to take no further action in the matter for the present.

In consequence of that letter the following circular was issued by the Commissioner of Internal Revenue:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
WASHINGTON, D. C., *November* 24, 1894.

In view of the fact that this department has been unable to formulate effective regulations for carrying out the provisions of section 61 of the act of August 28, 1894, relating to the rebate of tax on alcohol used in the "arts, or in any medicinal or other like compounds," collectors of internal revenue will, on receiving notice from manufacturers of the intended use of alcohol for the purposes named, advise such manufacturers that, in the absence of regulations on the subject, no official inspection of the alcohol so used, or the articles manufactured therefrom, can be made; and that no application for such rebate can be allowed or entertained.

On December 9, 1894, the Secretary of the Treasury in his annual report to Congress stated in substance, that owing to the defects in the legislation, the department was unable to execute the
25 provisions of the sixty-first section of the act of 1894, and that after a full consideration of the subject and an unsuccessful attempt to frame regulations which without official supervision would protect the Government and the manufacturers, the department was constrained to await the further action of Congress. In

that connection the Secretary estimated that the drawbacks provided for in the act would amount to $10,000,000 per annum, and that the cost of the necessary official supervision would not be less than $500,000 per annum.

At the request of the counsel for the defendants, the court has embraced in its findings the official action of the Secretary and Commissioner and further official proceedings which do not strictly form a part of the necessary findings of the court, and which it is not important to note in this connection.

The sixty-first section of the statute upon which the alleged right of recovery is based reads as follows: "Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or the repayment of the tax so paid." (Supp. R. S., vol. 2, 266, p. 330.) The act is entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," and took effect on and from its passage (*United States v. Burr*, 159 U. S., p. 78).

The contention of the plaintiff is, that by the terms of the statute a grant was made *in præsenti* to all persons who after the passage of the law find it necessary to use alcohol in the arts, or in any medicinal or like compound, and who actually use the same; that the right to a rebate or repayment of the tax paid upon such alcohol does not depend upon regulations to be made by the Secretary of the Treasury; that the right of repayment is complete and perfect by the grant and the fact of use, and not conditional upon regulations to be prescribed by the Secretary and the compliance by the manufacturer with such regulations.

Upon the part of the defendants it is contended that without regulations the right of the manufacturer is incomplete; that Congress left to the Secretary the right to determine the question of fact whether any regulations which he had the power to prescribe and enforce would adequately protect the revenue and the manufacturers, and he having determined that question in the negative no right to a rebate arose.

Very able and elaborate briefs have been filed upon the part of both parties in defense of their respective theories, and the court has in the investigation and determination of the cause been materially assisted by the labors of counsel.

The provisions of the statute upon which the contention has arisen embrace a subject-matter which for a period of more than thirty years has been a fruitful source of congressional legislation and judicial controversy, commencing in 1862, and extending to the time of the enactment of the law of August 28, 1894.

26 Many statutes have been passed by Congress, both civil and criminal, having reference to a tax on distilled spirits, the

collection of such tax by an elaborate system of regulations, and the enforcement of its payment by the enactment of severe penal laws against persons attempting to evade the enforcement of the law. The Internal Revenue Department having charge of that branch of the public service has, as is known from common knowledge, encountered serious and vexatious difficulties in devising regulations and adequate means to protect the interests of the Government against fraudulent evasion of the law; and the courts of the United States in their civil and criminal jurisdiction have been frequently engaged in the trial of causes which originated from violations of the revenue laws applicable to distilled spirits.

In the construction of the s atute it is proper for the court to take into consideration the circumstances under which it was enacted, and in the light of those circumstances consider the purpose and will of the legislature in construing the words used in the law. As has been said by the Supreme Court it is not proper for the court to recur to the views of individual members nor to consider the motives which influenced them in voting upon a given measure. "But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions." *Union Pacific Railroad v. United States*, 91 U. S., p. 72.

In the passage of the law of 1894, and the enactment of the sixty-first section, Congress had two purposes in view, the first was to raise a revenue from distilled spirits by the imposition of a heavy tax, and the second was to favor the manufacturer by a rebate and repayment of the tax on all alcohol used by him in the course of his trade and business. The tax was to be imposed and paid absolutely, unless the article was brought within the exemption of being used in the arts subject to the law, when by a repayment or rebate it was to be relieved of the burden of taxation for the benefit of the manufacturer. The revenue to be derived from the tax was the main purpose and policy of Congress, and the exemption for the benefit of the manufacturer was the secondary or subordinate purpose to be accomplished in the operation of the law.

Revenue is absolutely necessary to the existence of the Government, without which it could not exist; and perhaps the most troublesome duty in connection with the public service is in the department of taxes in the efficient enforcement of the law in the collection of the revenue. This has been found especially true in relation to the tax on distilled spirits ever since the adoption in 1862, of the policy of taxing them at very high rates of assessment. Enactment, surveillance and evasion have been the contending forces as is abundantly established by the history of the public service extending through many years in dealing with the subject of what is popularly known as the whisky tax. As is said by the Supreme Court, the object of the law in all its stringent provisions is to prevent fraud on the revenue and to secure the tax levied. (*Felton v. United States*, 96 U. S., 703.)

The act of 1894 imposed an additional tax on the manufacture of

27 alcohol for the purpose of increasing the revenue of the Government from that source, leaving substantially in force the provisions of law and the regulations of the department, thereby insuring the collection of the tax and the compliance of the manufacturer with certain conditions which from experience it was shown were necessary to insure the prompt and faithful collection of the assessment upon that particular product. In derogation of the general purpose to impose an additional tax on alcohol and thereby increase the revenue. Congress by the incorporation of section 61, into the act of 1894, provided that alcohol under certain circumstances should be relieved by rebatement from the burden imposed on it by other provisions of the statute. The same policy which through many years of the internal-revenue system of taxation had been adopted for the protection of the Government against the illicit manufacture of distilled spirits was continued, and no substantial change was made in the system of rules and regulations by which the rights of the defendants and honest manufacturers were protected against the fraud and competition of illicit distillation.

The policy of the exemption provided by section 61 had been considered many times in Congress, in 1882 (13 Cong. Rec., pp. 5325, 5360–'4), in 1886 (17 Cong. Rec., 341, 394, 582) and in the Senate of the Fiftieth Congress (Sen. Doc. No. 2332), and in the same Congress which enacted the law of 1894 a proposition to exempt alcohol used in the arts was rejected, so that while the provisions of section 61 became a part of the law by amendment after the bill had been under consideration for many months, it was not new in principle as a measure of discussion and consideration. The large number of claims which have originated under the provisions of section 61 show that it is a measure of far-reaching effect, and by its operation diminishes to a very material extent the revenue which would otherwise be raised from the tax on distilled spirits under the act of 1894; and while Congress were desirous of assisting the manufacturer in the production of his product by affording cheap material, the policy of the law in raising revenue for the expenses of the Government and the protection afforded by precautions against fraud by necessary and wise regulations were not disregarded. We make these general observations tending as they do to show the light in which must be construed the terms of section 61, on which the right of the claimant depends.

Many cases have been cited to sustain the different theories of construction contended for by the parties, the plaintiff insisting that the question has been definitely settled by decisions of the Supreme Court and the defendants contending that the construction insisted on by them is sustained by a proper application of the decisions of the court to the peculiar facts of this case. If the alleged cause of action of the claimant is dependent upon the action of the Secretary of the Treasury, and without such action the right is not consummate, then it is immaterial whether in law the refusal of the Secretary to prescribe regulations was justifiable. If he failed for any reason to perform a duty essential to the claimant's cause of action,

his failure is fatal to the right of recovery on the part of the claimant and no remedy can be afforded to him in this proceeding.

This being a suit to recover the rebate, it is not necessary to examine and discuss the question as to what might have been the rights of manufacturers to compel the Secretary to prescribe
28 regulations under which they might have been protected in the enjoyment of the benefits intended to be secured to them by the provisions of section 61.

In the case of *Campbell v. United States* (107 U. S., 407) a controversy similar to the one involved in this case was determined by the Supreme Court on appeal from this court. By the fourth section of the act of August 5, 1861, ch. 45, it was provided, "That from and after the passage of this act there shall be allowed, on all articles wholly manufactured of materials imported, on which duties have been paid, when exported, a drawback equal in amount to the duty paid on such materials, and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury." Under that act in January, 1862, the Secretary established such regulations as he deemed appropriate.

The regulations after having required certain acts on the part of the exporter provided that "all this having been done and the oath of the exporter and his bond with condition prescribed by the rules being given the collector is to give a certificate of the amount to which the party is entitled as a drawback on which he is to receive the money."

The plaintiff sued in the Court of Claims for a drawback, on account of a large amount of linseed cake made by them out of linseed imported from a foreign country and which they exported to London. The court dismissed the petition on the ground as stated in the opinion that it was not a cause of which the court had jurisdiction. The court, however, upon an issue being made found the facts upon which the conclusion of law dismissing the case for want of jurisdiction was based. After a statement of the facts as found by the Court of Claims the Supreme Court says:

The argument of counsel for the United States is, that until the officers of the customs comply with all the regulations of the Secretary of the Treasury, and the collector issues the drawback certificate, the law imposes on the United States no obligation to pay anything for such drawback; that the law conferred on the Secretary the right to make the regulations, and the collector the power to make the certificate for payment of drawback, and that the refusal of the collector to perform the duties imposed upon him preliminary to making his certificate, and then refusing the certificate totally defeats the claim of the party, who, by the law, is guaranteed a right to his drawback, and who has complied with all that the law requires of him to secure and enforce it. To the same effect is the opinion of the Court of Claims.

It would be a curious thing to hold that Congress, after clearly defining the right of the importer to receive a drawback upon subsequent exportation of the imported article on which he had paid duty, had empowered the Secretary by regulations, which might be

proper to secure the Government against fraud, to defeat totally the right which Congress had granted. If the regulations of themselves worked such a result, no court would hesitate to hold them invalid as being altogether unreasonable.

But the regulations in this case are not unreasonable, nor do they interpose any obstacle to the full assertion and adjustment of plaintiff's rights. It is the order of the Secretary of the Treasury forbidding the collector to proceed under these regulations or in any other mode, which is the real obstacle. Is that order a defense to this action? Can the Secretary, by this order, do what he could not do by regulations; repeal or annul the law? Can he thus defeat the law he was appointed to execute, by making regulations, and then by ordering his officers not to act under them, and not to act at all, place himself above the law and defy it?

We think the Court of Claims has jurisdiction of such a claim: (1) Because it is founded on a law of Congress; and (2) because the facts found in this case raise an implied contract that the United States will refund to the importer the amount he paid to the Government. * * *

The act of Congress having declared that on exportations there shall be allowed a drawback equal in amount to the duty paid on such material, and the Secretary having established by a regulation that, as regarded the cake resulting from the manufacture of the linseed into oil and cake, the latter represents at 17 cents per hundred pounds the duty on the imported seed so converted into cake, there resulted a contract that when exported the Government
29 would refund, repay, pay back, this amount as a drawback to the importer. If this be not so, it is because it is impossible to make a contract when the details of its execution or performance are left to officers who refuse to carry them out.

So it is equally clear that this claim is founded on the law allowing drawback.

The Court of Claims makes the mistake of supposing that the claim is founded on the regulations of the Secretary of the Treasury.

The counsel for plaintiff has cited in his opening brief the case of *Railroad Company v. Smith* (9 Wall., 95) which is cited in the opinion of the court in the Campbell case. That case originated under the provisions of the act of September 20, 1850, chapter 84, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands" within their limits, the first and second sections of which provide:

First section says that, "the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to States.

Second. "That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas and, at the request of said governor, cause a patent to be

issued to the State therefor; and on that patent, the fee-simple to said lands shall rest in the said State."

The duty devolved on the Secretary was wholly neglected, and in the case of Smith it was insisted that the failure of the Secretary to act as required by the law made the lands subject to a grant for railroad purposes of a date subsequent to the swamp-land act, but the court said:

Must the State lose the lands, though clearly swamp land, because the officer has neglected to do this? The right of the State did not depend on his action, but on act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay. * * *

Any other rule results in this, that because the Secretary of the Interior has failed to discharge his duty in certifying these lands to the States, they, therefore, pass under a grant from which they are excepted beyond doubt; and this, when it can be proved by testimony capable of producing the fullest conviction, that they were of the class excluded from plaintiff's grant.

This court has decided more than once that the swamp-land act was a grant *in præsenti*, by which the title to those lands passed at once to the State in which they lay. (93 U. S., 170.)

In the case of *French v. Fyan* (93 U. S., 169, 173), the court, reaffirming the case — *Railroad Company v. Smith*, said:

There was no means, as this court has decided, to compel him (the Secretary) to act, and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the Secretary to perform his duty.

In speaking of the power of the officers of customs in the Campbell case (*supra*) the court said:

Their function is entirely ministerial. They are authorized to pass upon no question essential to the claimant's right so as to conclude him in a court of competent jurisdiction. From the moment he presents his sworn entry they simply ascertain quantities, identify and mark packages, accept bonds and sureties, and see that the export article leaves the port in the ship. These and like duties being discharged, it is the collector's duty—a mere ministerial function—to give the certificate of drawback. * * * He exercises no judicial or quasi-judicial function. He concludes nobody's rights and has no power to do so. The rights which the law gives cannot be defeated by his refusal to act, nor by his decision that no drawback was due.

In the case of *Morrill v. Jones* (106 U. S., 466), cited in the brief of the claimant's counsel, decided at the same term with the Campbell case, it is in substance held that the right of a rebate is consummate by the provisions of the law, and that a regulation

of the department introducing new conditions and qualifications not consistent with the purpose of the statute was null and void.

The law under which the rebate was claimed is as follows: Section 2505 of the Revised Statutes, "Animals, alive, specially imported for breeding purposes from beyond the seas, shall be admitted free, upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he may prescribe." By a regulation of the department it was provided that before the collector admits animals imported he must be satisfied that the animals are of a superior stock adapted to improving the breed of the United States. The court held that the regulation was in excess of the power of the Secretary as the statute clearly included animals of all classes imported for breeding purposes. The Secretary prescribed the regulations but they included an unauthorized restriction. The importer complied with all the legal regulations.

In the case of *Aucher v. Howe* (50 Fed. R., 367, 368) the same view is taken recognizing the enforcement of the statute in the preservation of the grant against restrictions and regulations tending to diminish or destroy the right provided by the law.

In the case of the *United States v. Mann* (2 Brock, 1) Chief Justice Marshall said in substance that rules of the department which go to the denial of justice should be disregarded by courts and it has been repeatedly decided that Congress cannot confer the power of making laws upon executive officers. It is fundamental in constitutional law that the law-making power is exclusively in Congress and cannot be delegated to any other department. Laws are sometimes dependent in their enforcement upon a condition to be ascertained and determined by some person having executive power, but that exception to the almost uniform operation of all laws is not a grant of legislative power in derogation of the function of the legislature.

In the case of *Field v. Clark* (143 U. S., 649) involving the constitutionality of the tariff act of 1890 growing out of the reciprocity policy of that statute it is said "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of Government. * * * What the President was required to do was simply in execution of the act of Congress. It was not the making of law."

It is insisted by claimant, that the facts of this claim bring it within the law announced by the Supreme Court in the Campbell case and in the cases cited by the court in elaboration and support of the theory of that case, and that in this case as in those cases the right of rebate or drawback does not depend on what the Secretary might do or fail to do. In the case of the *Railroad v. Smith* (9 Wall., 95) affirmed in the Campbell case there was an absolute failure to act on the part of the Secretary of the Interior; in the other cases regulations had been prescribed, but the collector under the advice of the Secretary refused to allow the rebate on the ground that the claimants had not brought themselves within the requirements of the rules of the department.

31 The contention of the counsel for the defendants is, that the statute in this proceeding is different in its requirements

from the statute in those cases and that the facts of this proceeding do not bring the claim within the reasons and law of those cases. The industry of counsel has brought to the attention of the court many considerations, tending as he claims to establish the construction of the statute for which he contends, in showing a necessity for the action of the Secretary of the Treasury in the promulgation of rules and regulations to enforce the efficient collection of the tax provided by the act of 1894, in the prevention of frauds upon the part of persons engage in manufacture in the pretended use of alcohol. Before the consideration of the rights of the parties upon the words and phraseology of the law it may not be inexpedient to a correct conclusion upon the issue to further consider the facts so apparent from common knowledge, that the Government from its experience in the collection of what is known as the whisky tax did not intend to abandon the safeguards which experience had shown to be necessary (although perhaps inadequate) in the enforcement of the revenue laws against persons engaged in the manufacture of high wines.

This law, as have all laws since the adoption of the policy of deriving a large tax from alcohol, provides many safeguards for the assessment and collection of the tax; and consistent with that policy Congress have provided that after the payment of such tax enforced by a system of rules and regulations, strict and technical, the tax may be rebated in favor of persons engaged in manufacture, and who in such manufacture use alcohol which has been subjected to the exactions of the law in the payment of the tax.

As has been said, two purposes must be recognized as incident to the policy of the statute: First, the collection of taxes on all alcohol manufactured, and second, that no alcohol escape payment of the tax by being fraudulently exempted under the rebate provided in section 61. The allowance of a fraudulent rebate would be as disastrous to the collection of revenue as the failure to secure the collection of the tax from the manufacturer. These considerations become essential in the construction of the law providing exemption from the payment of the tax in favor of the class of persons enumerated in section 61. The exact language of the sixty-first section is as follows: "Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein and exhibiting and delivering up the stamps, which shows that a tax has been paid thereon shall receive from the Treasury of the United States a rebate or repayment of the tax so paid." (2 Supp. R. S., p. 330.)

The effect of the statute is to exempt from taxation alcohol used in the "arts or any medicinal or other like compounds" and to that extent it operates as a discrimination against persons who use and consume alcohol for any other purposes than those enumerated in the law. Equality is the fundamental theory of taxation and

statutes providing exemptions being in derogation of that theory are construed strictly. The Supreme Court in the case of the *Winona and St. Peter Land Company v. Wisconsin* (159 U. S., 32 529) says "It is a familiar law that statutes exempting property from taxation are to be strictly construed," and in support of that theory the court cites *Burch v. Tennessee* (104 U. S., 493); *Railroad Company v. Dennis* (116 U. S., 665); *Railroad Company v. Thomas* (132 U. S., 174); *Schurz v. Cook* (148 U. S., 397).

The liability of the Government and the correlative right of the claimant to a recovery are determined by the construction of the words "any manufacturer finding it necessary to use alcohol in the arts or in any medicinal or other like compound may use the same under regulations to be prescribed by the Secretary of the Treasury." These are the words which by construction determine the issue of this proceeding. If, as in the Campbell and other cases cited by counsel for claimant, there is a grant *in præsenti*, by the terms of the statute, not depending upon the action of the Secretary, the case comes within those cases, and the claimant's right is consummate and complete without the action of the Secretary in the prescription of regulations.

In the Campbell case the controversy arose on the law of August 5, 1861, chapter 45, which provides as follows: "That from and after the passage of this act there shall be allowed on all articles wholly manufactured of materials imported on which duties have been paid when exported, a drawback equal in amount to the duty paid on such material and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury."

By this statute there is a grant *in præsenti* to all persons who wholly manufacture articles of material, imported on which duties have been paid a drawback, when such manufactured article is exported, equal in amount to the duty paid on such imported material, which drawback is to be "ascertained under such regulations as shall be prescribed by the Secretary of the Treasury." The manufacture and exportation is not to be conducted and carried on under such rules and regulations as may be prescribed by the Secretary, but the extent of the drawback, measuring the rights of the manufacturer, is to be ascertained under such regulations as may be prescribed by the Secretary. The regulations of the Secretary do not become a part of the grant, but simply a means by which the drawback is to be determined as a matter of fact.

Mr. Justice Miller, in the case of *Railroad Company v. Smith*, *supra* (9 Wall., 95), says: "The first section of the act, after declaring the inducements to its passage, says that the whole of these swamp and overflowed lands, made thereby unfit for cultivation and unsold, are hereby granted to the States." The substance of that decision is that the act conferred a vested right to such lands, though the subsequent identification of them was a duty imposed upon the Secretary of the Interior.

In *Morrill v. Jones* (106 U. S., 466) the controversy arose on section 2505, Revised Statutes, in relation to the importation of cattle for breeding purposes. The Secretary sought to introduce an un-

authorized restriction, and the Supreme Court held that it was beyond the power of the Secretary to enlarge the requirements of the statute. The law provided that the cattle should be admitted free of duty upon proof satisfactory to the Secretary. The law made an exemption of cattle imported for breeding purposes, not dependent upon regulations prescribed by the Secretary, but provided by the very terms and assurance of the law. It was a grant of abso-
33 lute exemption against all duty to persons importing into the United States cattle having as the object of such importation a certain purpose. The Secretary added a qualification not required by the statute, and the Supreme Court decided, that the law was the full measurer of the claimant's responsibility and right, and that the regulations of the Secretary formed no part of the exemption and grant. In those cases the statutes giving the right are different in their phraseology from the statute involved in this controversy; and upon that difference the Supreme Court decided that a grant was made complete and consummate, not dependent upon the subsequent action of an executive officer. The regulations required and contemplated under those statutes were subordinate and provided a subsidiary means to ascertain the fact, but formed no part of the grant of right.

We have carefully considered the supplemental briefs filed by counsel, and the cases cited to support the theory of the claimant, but we do not find that the doctrine of those cases affect the construction of the statute in his favor.

In the case of *Bartram v. The United States* (77 Fed. Rep., 604) and other cases cited from the Federal Reporter, the line of judicial decision made by the Campbell case is followed, in regarding the grant as perfect, and not dependent upon the action of the Secretary. In the Bartram case the statute (act of August 28, 1894) provided for the admission of certain articles free of duty, "but the proof of the identity of such articles shall be made under the general regulations to be prescribed by the Secretary of the Treasury." The court said as to regulations: "None have been made under this paragraph at the time of these importations, and therefore none applicable were then in force. The failure to make them would not cut off nor suspend the right, but would leave none to be complied with."

As has been said (*supra*) in reference to the drawback in the Campbell case, the regulations do not become a part of the grant, but simply a means by which the amount of the drawback is to be determined as a matter of fact.

It is insisted in the supplemental brief of counsel for claimant that the proceeding is to recover a debt due from the United States for taxes paid; and that it is only a question of fact as to how much alcohol was used on which a tax had been paid. That theory of the claimant's right would be correct if it were not for the conditional character of the grant.

The grant in the statute under consideration is the right to use alcohol "under regulations to be prescribed by the Secretary of the Treasury," and when so used it is to be exempted from taxation by a rebate or repayment of the amount of tax paid by the distiller.

There can be no vested right in the manufacturer in the exemption of alcohol used by him unless it is used in pursuance to regulations prescribed by the Secretary of the Treasury, for the reason that the grant to him provides that he "may use the same under regulations to be prescribed." The prescription of the regulations by the Secretary forms a most essential part of the grant, and without the condition upon which the manufacturer is to have the exemption the grant fails. It may have been the duty of the Secretary to prescribe regulations (of that we express no opinion), but his failure to do so will not supply a necessary and essential element in the cause of the claimant. If the regulations "to be prescribed by the Secretary of the Treasury" form a part of the affirmative right of the
34 claimant to the rebate, and the grant embodies as one of its essential elements such regulations, the want of such regulations cannot be supplied by the failure of the Secretary to prescribe regulations.

In view of the construction we have given to the language of section 61, it is unnecessary to discuss and examine the reasons assigned by the Secretary of the Treasury as a justification of his failure to prescribe regulations sufficient to protect the Government; but the failure may be considered as tending to indicate the construction which Congress in the consideration of his report placed on the act of 1894.

At the first session after the enactment of the law and the failure of the Secretary to prescribe regulations, he communicated to Congress the fact that no regulations had been prescribed for the reasons set forth in that report. Congress in view of such failure made no provision to meet the condition indicated in the report; but after a delay of nearly two years, to wit, on June 3, 1896, repealed so much of the law of 1894 as was embraced in section 61, and by the second section of the act authorized the appointment of a joint committee to "consider all questions relating to the use of alcohol in the manufactures and arts free of tax and to report their conclusion to Congress." (29 Stats., 195.) This may with great propriety be regarded as a legislative construction of section 61, as indicating on the part of Congress the belief that it was important and necessary that regulations should be prescribed; and that the use of alcohol with a right of rebate of taxes should be guarded with the same degree of vigilance that is exercised over the manufacture of the same.

In the construction of a statute it is the duty of the judiciary to determine the legislative intent and purpose and conform its construction as near as possible to that intent and purpose. The action of Congress upon the report of the Secretary has to some extent the effect of a declaratory act and therefore competent to be considered in determining the proper construction of section 61, not in retrospective operation to change the law from its expressed meaning, but to enable the court to properly solve doubts which arise from the ambiguous terms and provisions of the statutes. While it is the duty of the judiciary to determine for itself the construction of all laws involved in the case, it may with propriety consult the action of other departments. The right of the manufacturer to a rebate

being dependent on the regulations of the Secretary, such regulations are conditions precedent to his right of repayment, and therefore no right of repayment can vest until in pursuance of regulations the manufacturer uses alcohol as contemplated by the statute. The statute having prescribed certain conditions upon which the right of the claimant is predicated, and from which it originates, there can be no cause of action unless it affirmatively appears that such conditions have been complied with on the part of the claimant. This is a proceeding based upon an alleged condition of liability upon the part of the defendants, and it must be shown that all the essential elements of that condition exist before any liability can accrue. Conceding that it was the duty of the Secretary to prescribe regulations consistent with the purpose and requirements of the law, his failure to do so will not supply a necessary element in the cause of the claimant.

The judgment of the court is that the petition be dismissed.

35 VII.—*Judgment of the Court.*

At a Court of Claims held in the city of Washington on the 6th day of December, A. D. 1897, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, Robert Dunlap, be dismissed.

BY THE COURT.

36 VIII.—*Appeal to the Supreme Court of the United States and Allowance of Same.*

ROBERT DUNLAP
vs.
THE UNITED STATES. } No. 18778.

From the judgment rendered in the above-entitled cause on the 6th day of December, 1897, dismissing the claimant's petition, the claimant, Robert Dunlap, by his attorney of record, George A. King, on this 9th day of December, 1897, makes application for and gives notice of an appeal to the Supreme Court of the United States.

GEORGE A. KING,
Attorney of Record.
WILLIAM B. KING, *Counsel.*

The aforesaid application for the allowance of appeal having been filed in open court December 9, 1897, it was ordered that the same be allowed as prayed for.

BY THE COURT.

37 In the Court of Claims.

ROBERT DUNLAP, Doing Business under the Firm Name of R. Dunlap and Company,
vs.
THE UNITED STATES. } No. 18778.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application for and the allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 22d day of December, 1897.

JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

Endorsed on cover: Case No. 16,760. Court of Claims. Term No., 547. Robert Dunlap, appellant, *vs.* The United States. Filed December 22d, 1897.